

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL COURT)**

CLAIM NO.: BVIHC (COM) 0019 of 2018

BETWEEN

CONVOY COLLATERAL LIMITED

Applicant

-v-

**BROAD IDEA INTERNATIONAL LIMITED
CHO KWAI CHEE (also known as CHO KWAI CHEE ROY)**

Respondents/Defendants

Appearances:

Mr Paul McGrath QC of Essex Court Chambers and with him Ms Lucy Hannett of Harneys for the Applicant

Mr Richard Morgan QC and with him Ms Rosalind Nicholson of Walkers for the First Respondent

2019: June 26
July 30
August 27

Reasons for Decision

- [1] **Adderley J (Ag)**: On 30 July 2019 following a hearing on 26 June 2019, I gave judgment in favour of the Claimant that the freezing order granted by the court on 9 February 2018 and continued by the court on 6 March 2018 by Chivers J should continue. I promised to give my reasons in writing and now do so.

The Factual Background

- [2] The application was brought by Convoy Collateral Limited (“Convoy”) against Broad Idea International Limited (“Broad Idea”), a company incorporated in the BVI, for a freezing injunction in aid of foreign proceedings commenced in Hong Kong. Broad Idea at all material times owned 18.85% of the Shares in Town Health International Medical Group Limited (“Town Health”), a company incorporated in the Cayman Islands and continued in Bermuda. Convoy is a wholly owned subsidiary of Convoy Global Holdings Limited (“Convoy Global”). Convoy’s core business is money lending.
- [3] The directors of Broad Idea are Cho Kwai Chee Roy (“Roy Cho” or “Mr Cho”), Francis Choi Chee Ming (“Francis Choi” or “Mr Choi”), and Kevin Cho. The shareholders of Broad Idea are Roy Cho (50.1%) and Francis Choi (49.9%).

The Procedural Background

- [4] Convoy first sought a freezing order against Broad Idea in a Notice of Application dated 2 February 2018 (“the First Application”) whereby it sought a freezing order against both Broad Idea and Mr Cho in support of Hong Kong High Court Civil Action 399/2018 (“HCA 399/2018”). The First application was heard *ex parte* on 9 February 2018 and the court granted the freezing order as prayed (“the February Injunction”).

[5] The February Injunction was continued by consent against Mr Cho on 6 March 2018, 19 June 2018, and 12 December 2018 (“the December Order”). At each of the return dates Mr Cho was represented and until November 2018 Carey Olsen represented Broad Idea. By the return date of 12 December 2018 Broad Idea was represented by Walkers (acting on the instructions of Francis Choi), and Mr Cho had separate legal representation by Appleby. From March 2018 the terms of the February Injunction were continued by Broad Idea in the form of undertakings given by Broad Idea to the court in the same terms as contained in the February Injunction.

[6] At the December 2018 hearing it was ordered by consent:

- a. That the February Injunction against Mr Roy Cho be continued pending a further return date; and
- b. The March Undertakings given by Broad Idea were continued by consent, subject to the following terms:

“Upon [Broad Idea] undertaking to the court to continue to abide by the terms of undertaking recorded in the recital of [the March Order] pending the Adjourned Return Date PROVIDED ALWAYS THAT nothing in this undertaking shall prevent [Broad Idea] from completing the transfer pursuant to the share Purchase Agreement made on 20 November 2018 of the legal and beneficial interest in 707,869,805 ordinary shares in the capital of Town Health International Medical Group Limited upon the receipt by [Broad Idea] of an opinion from Mr Benjamin Yu SC (or such other Senior Counsel in Hong Kong as may be agreed between the Applicant and [Broad Idea] jointly instructed by the Applicant and [Broad Idea] in terms to be agreed between the Applicant and [Broad Idea]), that such transfer is not contrary to the laws of the Hong Kong Special Administrative Region (“the Undertaking”)

[7] The Undertaking voluntarily given by Broad Idea replaced the February Injunction in relation to Broad Idea. From the transcripts it is evident that Chivers J granted the February Injunction under the assumption that Mr Choi was an innocent party. From his comments he took into consideration

the evidence that Mr Cho had embarked on a course of liquidating his assets, concealing shares by transferring them to nominees and closing margin accounts relating to those assets. The judge had before him the draft of Hong Kong claim 399/2018 which had not yet been filed but was able to deduce the risk of dissipation from the claims made and the actions of Mr Cho. Mr Choi was not a party to those proceedings. From his affidavit dated 28 November 2018 sworn on behalf of Broad Idea, Mr Choi also asserted that he was an innocent party. This was the belief of Convoy when it accepted the Undertaking. Mr Choi stated that the “*The HK Proceedings made no allegations against either Broad Idea or me.*” In the said affidavit the HK Proceedings is defined as *HCA 399/2018*.

[8] The return date had been set for hearing on 2 and 3 April 2019 to consider *inter partes* the February Injunction.

[9] However, the April dates were used instead to consider the preliminary question of whether the court had power or jurisdiction to order service of a free-standing injunction in aid of foreign proceedings out of the jurisdiction on a foreign person, Mr Cho, who was not resident in the jurisdiction or otherwise subject to its *in personam* jurisdiction, but had considerable assets in the BVI.

[10] On the hearing of the preliminary point, in a written judgment delivered 2 May 2019 leave to serve out of the jurisdiction given by Chivers J was set aside and the Order discharged (“first instance Order”). It was held that the court has no power to make orders against foreign persons outside its territorial jurisdiction and over whom it has no *in personam* jurisdiction unless authorized by statute. It was further held that on its true construction there is no such power under the Eastern Caribbean Civil Procedure Rules or statute. Accordingly, the judge held that he had no jurisdiction to grant leave and or to make first instance Order and the February Injunction was discharged against Mr Cho.

[11] Therefore, June 26 was the first effective *inter partes* return date for the court to deal with the merits against Broad Idea of the continuance or discharge of the February Injunction against Broad Idea.

The continuation and discharge application

[12] Subsequent to the first instance Order, the Court of Appeal, on an application by Broad Idea, gave leave to appeal the first instance Order, and on 25 June 2019 granted a stay of execution of paragraphs 1, 2 and 4 of that order pending the determination of the appeal. Paragraphs 1, 2 and 4 of the Order which was stayed by the Court of Appeal read as follows:

“It is ordered that :

1. The Service Order [by Chivers, J] is set aside against the Second Respondent [Mr Cho].
2. The Freezing Order (together with all subsequent orders continuing the Freezing Order) is set aside as against the Second Defendant...
3. ...
4. The Applicant [Convoy] shall pay the Second Respondent’s costs of these proceedings, to be assessed if not agreed, against which the Applicant shall pay the sum of \$147,105.60 on account within 14 days.”

[13] The application of Convoy for interim relief against Broad Idea was based on its claim against Mr Cho. With the first instance Order stayed the February Injunction therefore now remains in place against Mr Cho.

The First Defendant’s Case

[14] Mr Richard Morgan QC argued that Convoy has made no substantive claim against Broad Idea in this or any jurisdiction, and there are no substantive proceedings brought by Convoy

pending against Broad Idea in any jurisdiction so there is no good arguable case against Broad Idea.

[15] Likewise there are no substantive proceedings in this jurisdiction against either of Broad Idea's shareholders Mr Cho or Francis Choi.

[16] He points out that although there are substantive proceedings brought against Mr Cho in Hong Kong, Convoy has never sought a freezing injunction against Mr Cho in Hong Kong.

[17] Broad Idea's other shareholder, Mr Choi voluntarily applied to be joined to the Hong Kong High Court Civil Action 2922/2017 ("HCA 2922/2017" or the "Hong Kong Proceedings") brought by Convoy, amongst others. However Mr Choi complains there is no substantive relief sought against him in Hong Kong, and no claim sounding in damages is made, nor does it make a claim that might require enforcement in the BVI.

[18] He argues that Convoy has asked the court to treat Broad Idea as a non cause of action ("NCAD") defendant but it is not a defendant at all (CPR 2.4), and is not joined to any proceedings anywhere to which Broad Idea might be said to be a necessary party nor is it likely to be so joined. Mr Morgan QC argues that Convoy has no good arguable case against Broad Idea, nor any proper evidence of a risk of dissipation against Mr Cho, nor has Convoy given full and frank disclosure.

[19] He submits that there is no basis upon which the court can or should properly grant an injunction against Broad Idea where there is no claim against Broad Idea in any jurisdiction, and no claim will be made against Broad Idea even if Convoy gets judgment in the Hong Kong Proceedings.

[20] He stated that although it is partly a matter for an appeal, the Black Swan jurisdiction relied upon by Convoy is mischaracterized by Convoy. It does not give rise to the grant of a free

standing injunction against someone who is not a defendant (properly so called) or a party to any proceedings. Further, whilst the court has (territorial) jurisdiction over a BVI company, it does not have power to grant a freestanding injunction against a BVI national who is not a party to the foreign proceedings. There is no power for the Court to grant any injunction against any person or entity within the BVI unless it is in support of an actual or potential cause of action that is ultimately justiciable in the BVI, and on any view a judgment against Mr Cho is simply not enforceable against Broad Idea.

[21] He continues that Convoy seeks an order against Broad Idea not only in relation to its share register but also in relation to its own assets, yet it makes no claim to substantive relief as against Broad Idea's assets in any proceedings in any jurisdiction and there is no allegation that Broad Idea's assets actually belong to Mr Cho.

[22] Broad Idea, he submits, is owned 50.1% of its shareholding by Mr Cho and 49.9% by Mr Choi, and there is no possibility of any Hong Kong judgment against Mr Cho being directly enforceable against Broad Idea's assets (a pre-condition to Chabra relief-see **Linsen v Humpuss** [2012] 1 BCLC 651 at [150] and [152]), unless the court is to be encouraged by Convoy in some yet unparticularized way to disregard the corporate veil and over 100 years of authority to the contrary effect. He referred to the reasoning of **Prest v Petrodel Resources** [2013] UKSC 34 (per Lord Sumption) regarding piercing the corporate veil.

[23] Mr Morgan QC concluded that the form of relief sought by Convoy is precisely that which the EC Court of Appeal held was not available to an applicant in **Yukos CIS investments Ltd & Anor v Yukos Hydrocarbons Investments Ltd & Ors** HCVAP 2010/028 ("**Yukos**") at [149] to [151], and is a form of relief in respect of which the court has no jurisdictional grounds for exercising a discretion (**Yukos** at [151]).

[24] Finally he underscores the fact that Hong Kong is the primary jurisdiction and no injunction has been sought there contrary to the principle advanced in **Yukos** [160] to [161] and in the injunction application Convoy is asking the court for the right to seek its recognition in Hong

Kong, thereby seeking to obtain through the back door what it should have been seeking to achieve through the front door.

The Applicant's case

[25] Convoy sought a Black Swan freezing order against Broad Idea in respect of its own issued share capital and the assets it holds, in particular its shareholding in Town Health.

[26] Mr Paul McGrath QC argued that the court has jurisdiction because Broad Idea is a BVI company and its shares are subject to the jurisdiction of the BVI court. He states that the BVI court is best placed to exercise that jurisdiction.

[27] He submitted that Convoy has a good arguable case in the Hong Kong Proceedings against Mr Cho and Mr Choi with a claim in damages against both together with other relief.

[28] He claimed that the risk of dissipation derives from the nature of the alleged underlying wrongdoing which forms a part of the HCA 399/2018. Furthermore despite Mr Cho being a successful businessman in Hong Kong, Convoy was unable to find assets of value belonging to Mr Cho in Hong Kong prior to filing for the February 2018 injunction. At that time, Mr Cho had fled Hong Kong and did not return until September 2018. The only asset of Mr Cho in Hong Kong that Convoy could locate was a property which was mortgaged to Hang Seng Bank.

[29] The affidavit evidence asserts that since the February Injunction was granted Mr Cho has caused the mortgage to be discharged, procured a BVI company incorporated on 13 February 2018 to give him a loan of HK\$100m and granted a legal charge over the property as security for a loan. In addition Francis Choi has been actively trying to cause Broad Idea to transfer 49.9% of its shareholding in Town Health to him personally which would have the effect of removing it from the jurisdiction of the BVI court, and Broad Idea's board has approved the transaction acting via Mr

Cho and Francis Choi as directors. There is also further evidence that Mr Cho was putting up for sale further Hong Kong properties in which he had an ownership interest.

[30] Mr McGrath QC asserts it is just and convenient to grant the injunction because the risk to Convoy if no injunction is granted is significant, and could render any judgment in favour of Convoy nugatory. He stated that Mr Cho and Francis Choi have not alluded to any risk or inconvenience arising from the existing undertakings or the injunction applied for, and that the facts weigh heavily in favour of the court granting protection over Broad Idea and its assets.

[31] The relevant assets sought to be covered by the freezing injunction include;

- (i) the entire shareholding of Broad Idea which is owned and/or controlled by Mr Cho alone or in concert with Francis Choi; and
- (ii) Broad Idea's principle asset which is 18.85% shareholding in Town Health on the ground (a) that is the source of the value of its shares held in Broad Idea by Mr Cho or (b) it is at least arguable that Broad Idea is no more than a look-through company or money box serving the interests of Mr Cho and/or Francis Choi and therefore such assets are ultimately beneficially owned by or otherwise available for execution of any judgment against Mr Cho or Francis Choi. The latter proposition was also apparently accepted by Chivers, J in granting the February Injunction.

[32] Convoy's case is that Broad Idea is a company incorporated for the purpose of shielding the activities of Mr Cho, or alternatively he and Mr Francis Choi acting in concert and if the court is satisfied that there is a good arguable case of either of these scenarios it should grant Convoy protection by the injunction to prevent dissipation of Broad Idea's assets.

Discussion

- [33] In his said affidavit of 28 November 2018 Mr Choi referred in paragraph 22 to proceedings before the Hong Kong Court with the reference HCA 2922/2017. That action makes similar allegations against Mr Cho and other defendants. Mr Francis Choi has been added as the 40th defendant as a facilitator. The court took this into consideration although it is still open to the Respondent to challenge the effect of this at a later date.
- [34] The causes of action in Hong Kong against Mr Cho and his associates are for breach of statutory duties, unlawful means conspiracy, lawful means conspiracy, dishonest assistance, fraud and misappropriation of assets giving rise to loss and damages in the sum of HK\$715,070,754.80 or about US\$92,267,194.10. As it relates to Mr Francis Choi the causes of action include facilitating Mr Cho and his associates in their alleged wrongdoing in material ways recognized under BVI law. All are capable of resulting in money judgments by way of damages which would be enforceable in the BVI by various enforcement means against the shares in Broad Idea including appointment of a receiver by way of equitable execution and sale, or a charging order and sale.
- [35] Rix LJ in the Court of Appeal in **Lakatamia Shipping Company Ltd v Nobu** [2014] EWCA Civ 636 expressed the view at 42 that :
- “...if a claimant wishes to freeze company assets of a non-defendant, he must either be prepared to make a sufficient case that the company concerned is just a money-box of the defendant and holds assets to which the defendant is beneficially entitled, and/or it has to make that company a defendant itself under the Chabra Jurisdiction.”
- [36] In this case Broad Idea has been made a defendant in the BVI case. In addition, in his affidavit dated 28 November 2018, Francis Choi attests to Mr Cho’s control over Broad Idea. On the independent evidence so far the court accepts that there is a good arguable case that Broad Idea is a money box and both Mr Cho and Francis Choi are equally involved in the operation and management of its underlying investment in the shares of Town Health. Among other things this is

recognized by Town Health's treatment of Broad Idea's shareholding as being owned by Mr Cho and Francis Choi. In its Director's Report to its Interim Report, dated 30 June 2018, it disclosed that the 18.85% of its shareholding as it was at that time, was being held by directors Mr Cho and Francis Choi by a controlled corporation, namely Broad Idea. I accept the submission of Convoy that the Chabra Jurisdiction applies. Although the shares in Town Health were suspended from public trading with effect from 27 November 2017, it is still operating, independent appointments have been put in place to facilitate the resumption of trading and the shares have considerable value with an estimated market capitalization of HK\$5,193,000,000.00. Mr Cho and Francis Choi who continue to be on the board of Town Health as of 31 March 2017 claim 18.85% of that through Broad Idea's shareholding in Town Health.

[37] Even if the argument advanced on behalf of Broad Idea that the shares were legally and beneficially owned by it is correct, in order for the shares in Broad Idea to maintain their value it is necessary to restrain the disposal of the Town Health shares as well. This has nothing to do with piercing the corporate veil as advanced by the Respondent.

[38] As to Broad Idea being only a money-box of Mr Cho, Francis Choi denies this. However this must be viewed against the objective evidence of actions carried out. He himself stated in his evidence that Mr Cho controlled Broad Idea and that he was a passive shareholder.

[39] The First Affidavit of Yap E Hock (especially paragraphs 97 to 102) summarized in paragraphs 88 through 95 evidence from which a real risk of dissipation can be inferred: Mr Cho was embarking on a course of liquidating his assets, concealing shares by transferring them to nominees and closing margin accounts relating to those assets. The court also agrees that the transaction outlined under the heading "Breach of duties by Roy Cho" if true, and the actions being taken by the Independent Commission against Corruption can be classified as evidence from which the court can infer a low standard of commercial morality on the part of Mr Cho from which a real risk of dissipation may also be inferred.

[40] In the events which have happened as disclosed in the affidavits, although the court accepts the explanation given by Mr Choi for Broad Idea's delay in applying to set aside the February Injunction as being the fault of his attorney Lam & Co in Hong Kong, it is of the view there is a good arguable case that Francis Choi is not an innocent bystander caught up with the actions of Mr Cho. Despite the fact that Mr Cho has filed a defence denying the allegations it does not dullen the sharpness of the cogent evidence against him or the argument relating to the risk of dissipation.

[41] As a result of these events Convoy has withdrawn its agreement to the transfer by Broad Idea of the 707,869,805 ordinary Town Health shares to Francis Choi which it says was extracted by the misrepresentations of Mr Francis Choi evident from his own affidavit. As a result Convoy is carrying out further investigations in relation to Francis Choi and foreshadows further substantive claims for relief being sought against him in the Hong Kong Proceedings. Convoy claims that similar investigations are ongoing in respect of Broad Idea with special attention being paid to Broad Idea's trading history in Town Health Shares and how these trades are implicated in any of the extant Hong Kong proceedings.

[42] It was also noted that charges were brought against Mr Cho by the Independent Commission Against Corruption for conspiracy to defraud, and its investigations are ongoing, while discovery has not yet commenced in the Hong Kong Proceedings.

[43] In relation to whether it is just and convenient to continue the freezing order I take into consideration the guidance given by Lord Donaldson MR in **Polly Peck International plc v Nadir** [1992] 4 All ER 769 at 785E:

“a. Courts will not permit justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain;”

[44] Despite the fact that Convoy did not first seek a freezing order in the primary jurisdiction where the action was taking place, Hong Kong, as is expressed by the Court of Appeal in **Yukos** as ordinarily

the expected route, on the facts of this case at the time the relief was sought action in the BVI was the only practical and effective means available to Convoy to ensure meaningful enforcement. At that time it was the only unencumbered asset of Mr Cho known to Convoy. As submitted by Convoy, in practical terms the injunction will cause minimal disruption to Broad Idea which is a non-trading company and its shareholders Mr Cho and Francis Choi. In accordance with the principle in **Polly Peck** it is not intended, inter alia, to prohibit the Respondent from spending a reasonable sum on legal advice and representation in these proceedings.

[45] For all the above reasons I ordered that the freezing order be granted on the terms to be incorporated in an approved draft order including costs to Convoy to be assessed if not agreed.

The Hon. Mr. Justice K. Neville Adderley
Commercial Court Judge (Ag.)

By the Court

Registrar